2010 WL 6226574 (Mass.App.Ct.) (Appellate Brief)
Appeals Court of Massachusetts.

Terrence ROTHMAN, Plaintiff-Appellant,
v.
CAMBRIDGE HOUSING AUTHORITY, Defendant-Appellee.

No. 2010-P-1630.
March 9, 2010.

On Appeal from a Judgment of the Superior Court

Brief for the Defendant-Appellee, Cambridge Housing Authority

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*1 STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The only issue before this Court is whether the Superior Court abused its discretion in granting Appellee Cambridge Housing Authority's Motion to Dismiss Appellant Rothman's appeal of the Superior Court's dismissal of the underlying case by Summary Judgment.

STATEMENT OF THE CASE

This is an appeal from the dismissal of an appeal from the dismissal of a Superior Court action that sought collaterally to attack a judgment for possession entered against Plaintiff-Appellant Rothman ("Rothman") in a District Court summary process action. More specifically, on August 13, 2008, Rothman filed in the Superior Court a three count Amended Complaint arising out of his 2007 Summary Process eviction from one of Defendant-Appellee CHA's ("CHA") properties. On July 30, 2009, the Superior Court granted CHA's Motion for Summary Judgment on all counts of the Amended Complaint. On November 19, 2009, the Superior Court docketed Rothman's Notice of Appeal of Summary Judgment dismissal. Rothman failed to docket properly that appeal, despite the Superior Court's granting numerous motions filed by Rothman, ***2** including a 120-day extension of the appellate filing deadlines.

Rothman's extended time to perfect his appeal expired, and Rothman did not follow the correct procedure for filing an appeal. Therefore, on May 12, 2010, pursuant to Appellate Rule 10(c), CHA filed a Motion to Dismiss Rothman's appeal for noncompliance with the Rules of Procedure. Included with the Motion to Dismiss filing was Rothman's Opposition to the Motion. On May 17, 2010, the Superior Court granted CHA's Motion to Dismiss.

On June 16, 2010, Rothman filed a timely Notice explicitly appealing the May 17, 2010 Notice of Dismissal. See CHA's Record Appendix, [1] pg. 109. On September 13, 2010, the Superior Court notified the parties that the record for that appeal was assembled and the matter was docketed in this Court on September 20, 2010.

*3 ARGUMENT

I. Standard of Review

The standard for determining whether a trial court judge was warranted in dismissing an appeal is whether the judge abused his or her discretion. *See*, e.g., *McCarthy v. O'Connor*, 398 Mass. 193, 196 (1986).

II. The Superior Court's Dismissal Of Appellant Rothman's Appeal Did Not Constitute An Abuse Of Discretion.

Rothman wholly failed to take the steps required of him by the Rules to docket his appeal properly in this Court, despite the lengthy extensions of time to comply and notice that CHA was moving the Superior Court to dismiss the matter. Rule 10(c) of the Rules of Appellate Procedure provides that

> [i]f any appellant in a civil case shall fail to comply with Rule 9(c) or Rule 10(a)(1) or (3), the lower court may, on motion with notice by any appellee, dismiss the appeal, but only upon a finding of inexcusable **neglect**; otherwise, the court shall enlarge the appellant's time for taking the required action. If, prior to

> the lower court's hearing such motion for noncompliance with Rule 9(c), the appellant shall have cured the noncompliance, the appellant's compliance shall be deemed timely.

The responsibility for expediting appeals is "squarely on the appellant," and excusable **neglect** is appropriate only in "unique or extraordinary ***4** circumstances." *Mailer v. Mailer*, 387 Mass. 401, 407-406 (1982). "The concept of excusable **neglect** does not embrace a flat mistake of counsel about the meaning of a statute or rule or other garden-variety oversights." *McCarthy v. O'Connor*, 398 Mass. at 200 (internal citations omitted). Even if there is no explicit finding of "inexcusable **neglect**," it can be implicit in a judge's ruling on the motion in view of the circumstances of the matter. *Robinson v. Planning Board of Wayland*, 23 Mass. App. Ct. 920, 921 (1986) (affirming dismissal of appeal by pro se appellant).

In the instant case, the Superior Court did not make an explicit finding of inexcusable **neglect**, but granted the dismissal for the reasons in CHA's Motion to Dismiss and "after review of all the papers." See Rothman's RA, pg. 7. CHA believes that there was an implicit finding of inexcusable **neglect** based on Rothman's actions following his Notice of Appeal.

On July 30, 2009, the Superior Court granted CHA's Motion for Summary Judgment on all three counts of Rothman's Amended Complaint. On August 24, 2009, Rothman sent a Notice of Appeal to the Court. Due to some confusion, the Notice was not docketed until November 19, 2009. Rothman filed the following ***5** motions, many of which bore no correlation to anything in the Rules of Appellate Procedure:

Date docketed	Paper No.	Motion Title	Court's Action
12/14/2009	29	Motion to Suspend Proceedings Due to Absence of Appellant	Allowed on 12/23/2009
12/21/2009	30	Motion for Extension to File Brief and Appendix (120-day extension)	Allowed on 12/23/2009
12/28/2009	31	Motion for Transcripts	No order
1/11/2010	32, 33	Motion for Transcription and Waiver of Costs/Fees and Affidavit of Indigency and Supplement Affidavit	Allowed on 1/25/2010
2/3/2010	34	Plaintiff's Order of Transcription	No order
2/5/2010	35	Motion to Assemble the Record Including the Memoranda of Trial	Allowed on 4/13/2010
3/25/2010	36	Motion to Include All Case Memoranda and Motions Concerning Discovery for the Record on Appeal	Allowed only as to the memoranda submitted as part of the summary judgment record on 4/13/2010
5/3/2010		Plaintiff-Appellant Brief	Returned to Appellant
5/3/2010		Motion to Extend Time to File Brief and Appendix to Court of Appeals as the Transcriptions are Not Completed	Returned to Appellant

***6** See Rothman's RA, pgs. 6-7.

Rothman declined to follow Superior Court Rule 9A for any of the above-listed motions, and therefore, CHA had neither sufficient notice that many of them had been filed nor an opportunity to object. On two occasions, CHA's counsel sent Rothman letters in response to motions he filed directly with the court. In a March 29, 2010 letter, counsel for the CHA asked Rothman for further clarification on his pleadings and reminded Rothman of his obligations under Rule 9A. See CHA's RA, pg. 107. On April 22, 2010, counsel for CHA reminded Rothman about the steps he must take to perfect his appeal. Counsel also again reminded Rothman of his obligations under Rule 9A. See CHA's RA, pg. 108. Rothman continued to file motions directly with the Court, see the above table, and failed to take the steps articulated in the Rules regarding properly perfecting and docketing an appeal.

***7** Rothman had ample time and opportunity to perfect the appeal. The Superior Court granted Rothman a lengthy extension to docket the matter. It was somewhat unclear when the 120-day extension expired, see Rothman's RA, pg. 6, but assuming it was from the date of the Superior Court's order, it expired on April 22, 2010. CHA did not serve its Motion to Dismiss on Rothman until approximately 20 days after the expiration of the 120-day extension, providing Rothman with even more time. See Rothman's RA, pg. 7. Despite all of this additional time and notice that CHA intended to move to dismiss the appeal, Rothman was unable to docket properly his appeal.

Rothman's responsibilities in filing a compliant appeal are articulated in Rules 9 and 10 of the Rules of Appellate Procedure. Appellant must perform any act reasonably necessary to enable the clerk to assemble the record. Mass. R. App. P., Rule 9(c)(1). Appellant also must, within 10 days of filing his Notice of Appeal, deliver to the lower court clerk a transcript of the relevant portions of the proceedings in the lower court, a signed statement that he has ordered such transcript, or a statement that he does not intend to order the transcript. ***8** Mass. R. App. P., Rule 9(c)(2). Appellant must promptly deliver the transcript to the court upon his receipt of it. *Id*.

After the Court docketed the Notice of Appeal in this matter on November 19, 2009, Rothman took no other action in furtherance of the appeal until December 14, 2009, which constituted a violation of his obligation to act within 10 days of filing the Notice. The Court granted Rothman's motion for a 120-day enlargement of time in which to perfect his appeal. Rothman failed to do so at any time.

CHA recognizes that Rothman is *pro se* in this matter; however, Rothman's status as a *pro se* litigant does not excuse him from compliance with rules of procedure. *See Brossard v. W. Roxbury Div. of the District Court Dept., All* Mass. 183, 184 (1994)("the fact that the Appellant represents himself does not excuse his noncompliance with procedural rules"); *McCormick v. Labor Relations Comm'n*, 412 Mass. 164, 170 n.11 (1992)(*pro se* litigants bound by same rules of procedure as litigants represented by counsel); *Rosenthal v. Colonna*, 1996 Mass. App. Div. 111 (1996); *Connolly v. Moore*, 2000 WL 1616464, *1 (Mass. App. Div. October 24, 2000)(the fact that a party "was unrepresented by counsel, and was not an attorney, ***9** does not justify failure to comply with rules and statutes for appeals").

Rothman was allowed ample time and opportunity to file properly his appeal. This case had been dismissed on CHA's Motion for Summary Judgment in July, 2009. From that time until CHA's Motion to Dismiss in May, 2010, Rothman engaged in delay and filed numerous motions that had little or nothing to do with the Rules of Appellate Procedure. The result is that the appeal was not docketed in the Appeals Court and languished, with no end in sight. Rothman had more than adequate time to perfect and docket his appeal and did not, and therefore, the judge did not abuse her discretion in dismissing the appeal.

III. To The Extent That This Court Considers The Many Issues Offered In Appellant's Pleadings, The Superior Court's Motion For Summary Judgment Was Granted For Good Cause.

Rothman was a tenant in a housing development owned by CHA from April, 2005 until his eviction in October, 2007. See CHA's RA, pgs. 3 at ¶ 7, 7 at ¶ 49. Rothman's three (3) count Amended Complaint alleged two counts of disparate treatment disability and age discrimination and one count of discrimination by a failure to accommodate an alleged disability. ***10** See CHA's RA, pgs. 1-2. Count I stated that "[t]he eviction of Appellant Rothman is a violation of Massachusetts Housing Discrimination Act and a violation of ADA." Count II stated that "the Defendant (discriminated) is discriminating against the Plaintiff by denying

him the right to live in state (or federally) designated public housing in Cambridge, MA; although the Plaintiff has a medically confirmed disability and is qualified for public housing by age (64 years 11 months) and the fact of his indigency." Count III requested that CHA use a specific group of social workers, skilled in **elder** services, to mediate disputes between the parties as a reasonable accommodation.

Counts I and II

The Superior Court found that Rothman was estopped by the doctrine of res judicata from re-litigating Counts I and II in the Superior Court because he had a full and fair opportunity to raise those arguments in the District Court's Summary Process trial. See Rothman's RA, pgs. 29-37. The Superior Court held that Counts I and II would have been compulsory counterclaims under ***11** Mass. R. Civ. P. 13(a) even if Rothman had not actually raised the arguments in the District Court trial.

Counts I and II of the Complaint alleged that Rothman was improperly evicted (or "denied the right to live in public housing") due to unlawful discrimination. In his prayer for relief in Counts I and II, Rothman requested that he be "restored" to public housing. At the three-day eviction trial initiated by CHA, Rothman was given an opportunity to present evidence, cross-examine witnesses and assert defenses. See CHA's RA, pg. 7. At the conclusion of that hearing, the Cambridge District Court ordered that Rothman relinquish possession of his leased unit to CHA. See Rothman's RA, pg. 45. Furthermore, between the October 22, 2007 Judgment and July 30, 2008, Rothman filed numerous motions requesting that the court reconsider, modify or hold in abeyance its Judgment. See Rothman's RA, pgs. 45-49. The court heard and considered Rothman's arguments on these motions over a period of nine (9) months. *Id*. On July 30, 2008, the Court denied the final pending motion. See Rothman's RA, pg. 49.

If Rothman believed that his eviction was discriminatory or an improper denial of his rights, he ***12** had a full and fair opportunity to raise those defenses at the Summary Process action. See Uniform Summary Process Rule 3. For whatever reason, Rothman elected not to defend the eviction action brought against him on the grounds that it was discriminatory. The judgment for possession in favor of CHA in that case was final, and CHA cannot use this forum as a means collaterally to attack the judgment that has been entered against him in the District Court.

Count *III*

With respect to Count III, the Superior Court found that Rothman failed to present evidence that the accommodation he wanted - a third party mediator to hear disputes between himself and CHA - would have allowed him to be a "qualified handicapped individual" and comply with his lease. The Superior Court also found that Rothman's requested accommodation was unreasonable.

The Superior Court's holding was reasonable because Rothman cannot show that CHA has discriminated against him by its failure to grant his reasonable accommodation request. Discrimination prohibited by Chapter 151B and the Fair Housing Act includes the ***13** "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a [handicapped] person equal opportunity to use and enjoy a dwelling." *Andover Housing Authority v. Sholnik*, 443 Mass. 300, 307 (2005) (citations omitted). A "reasonable accommodation" is one that would not impose an undue hardship or burden on the entity making the accommodation. *See id*. at 307. The determination of whether a requested accommodation is reasonable is fact specific, and a tenant who alleges discrimination based on a landlord's failure reasonably to accommodate a disability has the burden of proving that the proposed accommodation is reasonable. *See id*. The United States Supreme Court has held that an accommodation is not reasonable if it imposes "undue financial and administrative burdens," *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979), or requires" 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial,' or that would constitute 'fundamental alteration[s] in the nature of...program[s].' " ***14** *Alexander v. Choate*, 469 U.S. 287, 300-301 n.20 (1985), quoting *Davis, supra* 442 U.S. at 410, 411 n.10 & 413. [2]

Rothman made no showing that 1) he is a handicapped person, 2) that the accommodation he has requested is reasonable or 3) that there is some nexus between Rothman's handicap and the accommodation he is requesting. Count III states in its entirety that

> The Defendant employees [*sic*] CASCAP Social Workers and activity-coordinators for **elder**-activities in disabled housing it manages. These specialists could help realize the Plaintiffs *[sic]* [reasonable accommodation] applied for in April 2007. The Defendant has however, **neglected** or prohibited that *[sic]* these highly qualified social worker *[sic]* be considered in the Plaintiffs *[sic]* application. In addition the **Elder** Service Plan (ESP) agency on 237 Franklin, lease part of that building, and have a number of staff trained in Geriatrics who are in daily contact with tenants in that building and who could be helpful as well.

See CHA's RA, pg. 2. Rothman's "Remedy to Complaint 3" continues,

> That the court instruct Defendant consider having CASCAP and ESP employees mediate misunderstandings between seniors or persons with disabilities where they see an opportunity to do so. And that they work with Community Dispute Settlement Center (names in [reasonable accommodation]) in ***15** efforts to implement the Plaintiffs [*sic*] request.

See CHA's RA, pg. 2.

The basis of Rothman's request was primarily for services of those trained in **elderly** and geriatric specialties. The law requires that CHA reasonably accommodate the needs of qualified disabled tenants, among others. See, *e.g.*, G.L. c. 151B, §4, ¶7A. To the extent that Rothman requested an accommodation due to his self-identified status as an **elderly** person, the law does not require CHA to accommodate that "condition" on its face. A tenant's advanced age does not, on its own, trigger an obligation by CHA to provide an accommodation. Furthermore, to the extent that Rothman requested an accommodation on behalf of persons other than himself, the law does not require CHA to accommodate "seniors" or "persons" generally, rather only those people who have demonstrated a handicap and have made an accommodation request.

Imposing a dispute resolution framework, in addition to the one already provided, would be an undue burden on CHA. CHA owns 2563 apartment units. See CHA's RA, pg. 3 at ¶ 6. Each tenant living in one of these units signs the same lease, including the ***16** same grievance procedures. *Id*. To change substantially the processes and procedures with respect to only one or a few tenants would impose a tremendous administrative burden on CHA. The law does not require CHA to undertake this burden. *See Alexander, 469* U.S. at 300-301. CHA provided a two-tiered system of dispute resolution, one which Rothman took advantage of and, at times, refused to participate in. Rothman's request for a different system of dispute resolution is unnecessary, unreasonable and presents an undue burden to CHA.

Even if Rothman had appealed the underlying Summary Judgment ruling in this matter, the Superior Court dismissed the case for good cause.

IV. Appellant's Outstanding Appellate Motion Regarding The Statute Of Limitation Is Moot And Should Be Denied.

Rothman filed a Motion For A Statute of Limitations Decision along with his brief in this matter. The Court forwarded that Motion to the panel assigned to this case. The matter of the statute of limitations under G.L. c. 151B is inappropriate and moot in the instant case because 1) it is outside the scope of the issues before this Court, see Argument I ***17** above, and 2) the Superior Court did not decide the Summary Judgment below on the grounds of the c. 151B limitations period, see Argument II above. Therefore, CHA requests that this Motion be denied.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court dismiss Appellant's appeal.

Footnotes

1 The Appendix Appellant Rothman filed with his brief is not a joint appendix in compliance with the Rules of Appellate Procedure, but rather Rothman's own compilation of documents. Appellee CHA disputes that most of the documents contained in Rothman's Appendix are relevant or necessary to the instant matter. In an effort not to provide duplicate material, CHA will refer to Rothman's Record Appendix as "Rothman's RA" and to its own Supplemental Record Appendix as "CHA's RA."

2 Rothman raises the case *Boston Housing Authority v. Bridgewaters*, 452 Mass. 833 (January 7, 2009) several times in his brief. Regardless of the holding of *Bridgewaters*, that case postdates Rothman's Summary Process eviction in 2007.

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